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I.1 Timing and Notice of the Administrative Record

Section 990.45 of the OPA regulations requires that a *publicly-available* Administrative Record (Record) be opened if trustees decide to conduct restoration planning pursuant to the OPA regulations. This means that trustees have made the required determinations of jurisdiction, likely injury to natural resources, and existence of feasible restoration alternatives for injured natural resources and/or services, and have determined that restoration planning should be pursued.

The Record must be opened concurrently with the trustees' issuance of the *Notice of Intent to Conduct Restoration Planning*. This Notice should be published in a public newspaper(s) or other circulation with distribution proportionate to the scope of the public affected by an oil spill incident. The Notice should indicate where the Record will be available for public inspection, and either list the times of availability or provide a contact person with whom interested members of the public can arrange to view the Record.

I.2 Purpose of the Record

If constructed and administered appropriately, the Record can serve several purposes:

- Provide a single repository for documents relied upon by trustees in making their determinations about restoration actions necessary and appropriate for a given incident;
- Provide a mechanism to facilitate public participation in the selection of restoration actions; and
- Provide a record for administrative or judicial review of trustees' actions and determinations.

These purposes can be achieved by giving careful consideration to the type, format, and timing of documents included in the Record. Trustees should reduce important decisions to writing, plan for meaningful organization for the Record, and provide uniform guidance to all personnel who are expected to receive or generate documents that should be included in the Record, among other things.

I.3 Documents to Include in the Record

The key criterion for determining whether a document¹ should be included in the Record is whether the document was relied upon by trustees in making their determinations about the appropriate type and scale of restoration needed to make the environment and public whole for injuries resulting from incidents. The deliberation and decisionmaking process of the trustees should be clear from a review of the Record. The Record should be explanatory, not merely conclusory. Therefore, options, actions, or interpretations considered but rejected by trustees should be included in the Record. In addition, if trustee policies or decisions that affect the direction or outcome of the NRDA are not normally memorialized in written form, consideration should be given to reducing these determinations to writing for the Record. For example, the Lead Administrative Trustee can develop a form that describes the date, trustees involved in a decision, subject of the deliberation, factors considered, if relevant, and final decision.

Documents that should normally be included in the Record include:

- All public notices required by, or made pursuant to, the OPA regulations;
- All notices, invitations, or other documents between trustees and RPs with respect to RP participation, comments on trustee determinations made pursuant to the OPA regulations, and requests for alternative assessment procedures, or other trustee-RP communications required by, or made pursuant to, the OPA regulation;
- All determinations trustees are required or encouraged to make under the OPA regulations, such as determinations of jurisdiction, likely injury, preliminary identification of feasible restoration alternatives, injuries to include in an assessment, selection of the most appropriate assessment procedures,² identification and evaluation of the range of restoration alternatives, etc.;
- Any applicable laws or regulations that affect the NRDA or OPA regulations that are not readily available to the public;

¹ "Document," for purposes of the Administrative Record, includes any form of information, such as data, pictures, electronic files, charts, etc.

² "Assessment procedures," for purposes of justifying the trustees' selection of the most appropriate procedures and for purposes of including workplans in the Record, should be interpreted broadly to include any analysis, test, or investigation performed at any stage of the assessment, from preassessment, emergency restoration, to restoration scaling.

- All workplans related to implementing the selected assessment procedures. The scope of a workplan will clearly depend on the scope and complexity of the incident, but at a minimum should identify the objective of the work, person(s) to carry out the work and their credentials, timeframe, and underlying assumptions for the procedure;
- Any quality assurance protocols or considerations relevant to the assessment procedures;
- Data generated from implementing assessment procedures, including output from any models or compensation formulas/schedules used (although the models or schedules themselves do not necessarily need to be included in the Record) if incorporated-by-reference);
- Existing data or literature used in making any determinations regarding injury or restoration;
- Final trustee conclusions drawn from assessment or investigative data;
- Reports compiled during preassessment or injury assessment activities (excluding reports prepared for purposes of litigation);
- The Draft Restoration Plan;
- Relevant literature relied upon that is not readily available to the public;
- Public comments and trustee responses to comments;
- Submissions made by the RPs that are not subject to confidentiality restrictions;
- Final coordination agreements among trustees or between trustees and the RPs;
- The Final Restoration Plan;
- The demand made upon the RPs to fund or implement the restoration plan, and their response; and

- Any final settlement agreement.

Documents prepared during the course of an NRDA should only be deposited into the Record once they are in final or “interim final” form. Documents unrelated to the particular incident that are in draft form but are relied upon by trustees in making injury assessment and restoration determinations should be included in the Record. In addition, draft versions of documents that are not finalized during the NRDA should be included in the Record if relied upon, and any draft documents made available for public review and comment should be included in the Record.

Submissions by the RPs: The OPA regulations encourage a very open, interactive assessment approach with the RP, with the goal of achieving prompt restoration without litigation. However, if a cooperative approach is not achieved, or does not lead to settlement, the Record should document the interaction between the parties and their points of agreement and disagreement. This may greatly facilitate judicial review of a trustee's claim for damages. Therefore, trustees should consider formally documenting their interactions with the RPs. Further, trustees should consider responding, either formally to the RPs or for the Record, to all documents or records that the RPs submit; such as comments received on trustee determinations or critiques of trustee assessment plans or analyses. Trustees are advised not to exclude submissions to the Record made by the RPs, but rather to document those submissions and report for the Record whether they were relied upon or not in the NRDA process.

I.4 Documents Not Included in the Record

Deliberative, pre-decisional documents: Personal notes, daily diaries, and internal agency deliberations that express opinions, advice, and recommendations of staff to other staff should not be included in the Record. However, if such deliberations result in a determination that affects the direction or outcome of the NRDA, the determination itself should be formally documented and included in the Record.

Documents related exclusively to liability: Unless relied upon in selecting injuries or restoration alternatives, documents related solely to the liability of certain parties should not be included in the Record.

Privileged documents, documents not releasable under government open records statutes: Documents covered by immunity from disclosure or an applicable privilege, such as attorney-client communications, should not be included in the Record. Therefore, if pertinent portions of such documents constitute information relied upon by trustees in making injury assessment and restoration determinations, then the appropriate portions of documents should be redacted, or the pertinent assessment material should be transposed into a new document. In the latter instance, the trustee should clearly indicate that the document is an excerpt from a withheld document, and identify the document and the justify withholding full disclosure.

I.5 Compiling the Record

Record coordinator or administrator: A single individual should be designated to coordinate collection of documents and their entry into the Record (e.g., Trustee Agency Coordinator or Administrative Specialist, refer to Appendix E). The trustee able to provide the location for the Record should typically function as Record coordinator, unless there is some logical reason to have another trustees (i.e., the LAT) serve in this capacity.

The Record coordinator should be a key member of the co-trustee NRDA team; familiar with documents that are being produced, records being received, or determinations made that need to be reduced to writing. The coordinator must devise a system for ensuring that all documents relied upon in making joint trustee decisions are collected from remotely-located personnel involved in the NRDA. The coordinator should distribute guidelines for record-keeping, such as clearly marking draft documents, and for delivery of documents for inclusion into the Record (i.e., provide quality assurance)

Compilation: Documents should be added to the Record as soon as they are submitted. However, depending on the scope and complexity of an incident, some trustees may not have adequate resources to dedicate personnel to maintaining a daily Record. In these situations, trustees may consider periodic updating of the Record, on a weekly or bi-weekly basis, for example. If trustees do decide to update periodically rather than instantaneously, the notice describing availability of the Record should describe the updating schedule. In addition, the Record coordinator must determine some mechanism to ensure that documents received but not entered are not misplaced prior to entry into the Record, such as a document log that may mirror the index to the Record.

Trustees should consider keeping two copies of each document in the Record that is available for public review. In addition, trustees may want to maintain an entire duplicate of the Record, perhaps consisting of the original copies of documents, in a non-public location.

Indexing: The index(ices) to the Record must facilitate public review, judicial review, and locating within the Record. Thus, a key component of an index will be a numbering system that facilitates filing and retrieval of documents. Numbering systems may vary with the needs of the particular incident. For instance, a simple incident may only require a chronological numbering system, assigning a single tracking number to a document as it is entered into the Record. More complex assessments may need nested indices with multiple numbers, for instance, a numeral to indicate the phase of NRDA or category of documents (e.g., turtle studies), and a second number to indicate chronological ordering of documents within a phase or category.

Other components may be included in an index to describe the documents, such as the title of the document, author, source, date, and type of document (e.g., literature reprint, data, still photographs).

Aspects of an index that will facilitate public review of the Record are discussed in the next section.

Closing the Record: After consideration of public comments received on the Draft Restoration Plan and issuing the Final Restoration Plan as a demand, trustees should officially close the Record for the Restoration Planning Phase. No documents should be entered into the Record after this time, except where such documents are offered by interested parties that did not receive actual or constructive notice of the opportunity to comment on the Draft Restoration Plan, do not duplicate information already contained in the Record, and raise significant issues regarding the Final Restoration Plan.

Availability of the closed Record: The Record for injury assessment and restoration planning should be available for public review until final settlement is reached, leading to restoration implementation, or until any litigation concerning damages based on the Final Restoration Plan is complete.

Record for implementation phase: Trustees may want to consider opening and maintaining a separate Administrative Record for the Restoration Implementation Phase. The primary objective of this Record is to keep the public informed of the progress of the restoration work. This Record should, at a minimum, document all decisions, actions, and expenditures taken by trustees during this phase, including any modifications made to the Final Restoration Plan and determinations of satisfactory completion of the plan.

The Record for the Restoration Implementation Phase should be opened, closed, maintained, and noticed for availability in the same manner as the Record for the Restoration Planning Phase.

I.6 Facilitating Public Participation

Section 1006(c)(5) of OPA requires that restoration plans be developed and implemented only after adequate public notice and consideration of all public comments. Public input is particularly relevant to trustee determinations regarding appropriate actions to make the environment and public whole for injuries to natural resources that are managed on behalf of the public.

In order to comply with this provision, the OPA regulations require that, at a minimum, trustees facilitate public review and comment on draft restoration plans that document the trustees' evaluation of feasible restoration alternatives and selection of a preferred alternative(s) for a given incident. Maintenance of an open Administrative Record will provide an expanded opportunity for involvement for those members of the public who are interested in more detail than may normally be included in draft restoration plans, such as raw data.

Attention to a few key aspects of a Record will enhance its accessibility to the public, such as the location of the Record, a user-friendly index to the Record, a system for document review, facilities for copying documents in the Record, and a mechanism for commenting on the Record.

Location: The Record should be maintained at a location readily accessible to a major segment of the public affected by, or expected to be interested in, the natural resources injured as a result of the oil incident, and at a facility open to the public. Space should be available that allows members of the public to conduct their review relatively free from disruptions, but that also allows the trustee to ensure the integrity of the Record.

Index to the Record: An index to the Record should be provided that facilitates public review. Documents in the Record should be organized or identified in a manner that clearly relates the decisionmaking process and highlights key NRDA determinations or other milestones. One obvious organization is chronologically within each phase of the NRDA; preassessment, restoration planning, and restoration implementation; perhaps with subcategories of injury assessment and restoration selection within the Restoration Planning Phase. Given that the OPA regulations require trustees to make numerous formal determinations, documents may be organized with respect to these determinations. Therefore, major categories in the index might include determination of jurisdiction, determination of likely resource injury, invitation to the RPs to participate in the NRDA, selection of injuries to include in the NRDA, preliminary identification of feasible restoration alternatives, and so forth.

The public index, which may be distinct from a more detailed index kept by the administrator of the Record, should group documents in categories that are meaningful to persons unfamiliar with NRDA's. Such categories may include identity and duties of trustees, response-phase activities of trustees, natural resource impacts investigated by trustees, methods for investigating natural resource impacts, restoration planning, etc.

The index must also provide document identification and location information, such as document number, or drawer number and document number, depending on the system employed by the trustee.

Reviewing documents: Trustees must devise a system that ensures that documents will not be lost, misplaced, or removed from the Record during public review. A simple, easily understood indexing and filing system, coupled with clear document identification, will help protect against misplacement. If sufficient personnel are available, trustees may require that members of the public select documents they would like to review from the index, then check those documents out from a Record custodian. Alternatively, some system to identify documents removed from the filing system must be devised, such as large checkout placards.

Trustees should keep a list of names and addresses of persons who personally inspect the Record, and consider mailing copies of the draft restoration plan to these individuals.

Copying documents: Trustees should institute a system that allows members of the public to copy documents in the Record, or arrange to have desired documents copied. Fees for copying to be facilitated by trustees or accomplished with government equipment must be determined prior to opening the Record, and should be prominently displayed in the Record review location. Government open records statutes are a likely source for determining appropriate copy costs for the public.

Public comments on the Record: At a minimum, trustees must provide a mechanism for members of the public to submit comments on a draft restoration plan, in which trustees describe the range of restoration alternatives considered, evaluate those alternatives according to the criteria provided in the OPA regulations, and identify their preferred restoration alternative(s). This process will likely consist of publishing a Notice of Availability of the draft restoration plan in appropriate newspapers, and describing the comment submission mechanism in the draft plan. Depending on the incident, trustees may also consider taking public comments during an open hearing or town meeting, which might necessitate recording equipment or trained recorders.

Trustees may also want to consider soliciting or accepting public input outside of the formal comment process related to the draft restoration plan. For example, comment forms may be made available in the area set aside for public inspection of documents. Depending on the significance of early comments and the need to fully document the basis for their NRDA decisions, trustees may decide to respond to these interim comments in writing as they are received, or they may defer response to a later official comment period. In this latter instance, the commenter should be informed that a response will be deferred.

All public comments received on the draft restoration plan, and any other document made available for public comment, must be included in the Record. Comments should be included in their original form; however, in responding to comments, trustees may consider summarizing and grouping like comments. Trustee responses must demonstrate that they did consider all comments, with particular attention to comments that go to matters that would change the outcome of the injury assessment or restoration planning process and final decisions.